MOTION FILED
OCT 4 - 1982

No. 82-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED

and

THE OPTIONS CLEARING CORPORATION,

Petitioners,

v.

BOARD OF TRADE OF THE CITY OF CHICAGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE SECURITIES INDUSTRY ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION AND BRIEF *AMICUS CURIAE* OF THE SECURITIES INDUSTRY ASSOCIATION

WILLIAM J. FITZPATRICK
Counsel of Record, General Counsel
Securities Industry Association

RONALD T. CARMAN
Assistant General Counsel
Securities Industry Association
120 Broadway
New York, New York 10271
(212) 425-2700

IN THE

Supreme Court of the United States

October Term, 1982

No. 82-327

CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED

and

THE OPTIONS CLEARING CORPORATION,

Petitioners,

v.

BOARD OF TRADE OF THE CITY OF CHICAGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE SECURITIES INDUSTRY ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The Securities Industry Association (the "SIA") hereby respectfully moves, pursuant to Rules 36.1 and 42 of the Court, for leave to file the attached brief *amicus curiae* in order to present its views on the jurisdictional question concerning which federal agency has jurisdiction over options on certain securities defined as exempt securities under Section 3(a)(12) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(12)(1976) and whether options on such securities fall under the definition of the term "security" as found in Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10)(1976).

The SIA believes that the court below erred in its conclusion on both these questions and contends the judgment of that Court should be reversed.

The SIA is a national trade association representing approximately 500 brokers and dealers responsible for over 90 percent of the nation's investment banking and securities brokerage business. The SIA is generally recognized as the primary public spokesman for the securities industry and the two questions before the Court are of vital importance to its members. The firms comprising the SIA's membership are located across the nation.

Many of the SIA's members provide both securities brokerage and commodities services to their customers. A clear, coherent, and predictable regulatory scheme is essential to optimizing the quality and quantity of services our members provide to their securities brokerage and commodities customers. This case presents issues which are of crucial importance to our members—that is, whether the securities or commodities statutes, rules, and regulations apply when our members are effecting transactions involving a particular investment vehicle.

If options on certain securities are construed not to be securities, our members would be tremendously impacted. The sale of such options would no longer have to comply with the registration provisions of the Securities Act of 1933, 15 U.S.C. § 77e (1976). Credit extended in connection with the purchase of such options would not be governed by the Federal Reserve Board's Regulation T, 12 C.F.R. § 220.3(i). Option purchasers would no longer be covered by the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa-78lll (1976). Concerning the jurisdictional issue, should the decision below not be reversed, the Securities and Exchange Commission would

no longer regulate certain segments of our members' business involving the purchase and sale of options. In short, the entire statutory and regulatory framework by which the SIA's members operate would be drastically affected.

The SIA determined to submit to the court an *amicus curiae* brief after a careful review of the Seventh Circuit's decision and the petitioners' brief. A review of these materials indicated to the SIA that although petitioners' petition for a writ of certiorari thoroughly addresses many of the legal issues involved, the brief did not, naturally, focus on the impact of the decision below on the brokerage community. Accordingly, the SIA's brief focuses on the legal issues involved and the immediate impact the decision below will have on the brokerage community at large. The SIA also filed as *amicus curiae* in support of petitioners' request for a hearing *en banc* by the U.S. Seventh Circuit Court of Appeals.

Respectfully submitted,

WILLIAM J. FITZPATRICK
Counsel of Record, General Counsel
Securities Industry Association

RONALD T. CARMAN
Assistant General Counsel
Securities Industry Association
120 Broadway
New York, New York 10271
(212) 425-2700

Questions Presented

The two questions presented by the Petition for a Writ of Certiorari are as follows:

1. Are standardized securities options (*i.e.*, options to purchase or sell a specified underlying security) which are widely offered and sold to the public through prospectuses and traded on a national securities exchange subject to regulation by the Securities and Exchange Commission under the federal securities laws?

2. If so, are such options subject to the exclusive jurisdiction of the Commodities Futures Trading Commission under the Commodity Exchange Act whenever the underlying securities are the subject of futures contracts traded on a commodity board of trade?

TABLE OF CONTENTS

	PAGE
Interest of the Securities Industry Association as *Amicus Curiae*	2
Statement	2
Decision of the Court Below	4
Summary of Argument	6
Argument	7
I. The Decision Below Will Cause Confusion in the Regulatory Scheme Over Financial Instruments	7
II. The Decision Below Incorrectly Interprets Two Federal Statutes and Their Relationship to Each Other	11
Conclusion	14

TABLE OF AUTHORITIES

Cases

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975)	10
Mansbach v. *Prescott, Ball & Turben*, 598 F.2d 1017 (6th Cir. 1979)	10
Marine Bank v. *Weaver*, ——U.S.——, 102 S. Ct. 1220 (1982)	10

PAGE

Savino v. *E.F. Hutton & Co.*, 507 F. Supp. 1225 (S.D.N.Y. 1981) 10
SEC v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943) 10
SEC v. *United Benefit Life Insurance Co.*, 387 U.S. 202 (1967) 10

Statutes

Commodity Exchange Act, as amended: 7 U.S.C. §§ 1-24 ..... *passim*

Commodity Exchange Act, as amended:
Sec. 2(a)(1), 7 U.S.C. § 2 ....1, 5, 6, 7, 11, 12, 13
Sec. 4(c), 7 U.S.C. § 6c 1

Securities Act of 1933, as amended:
Sec. 5, 15 U.S.C. § 77e 3
Sec. 8, 15 U.S.C. § 77h 4

Securities Exchange Act of 1934, as amended: 15 U.S.C. §§ 78a-78kk ..... *passim*

Securities Exchange Act of 1934, as amended:
Sec. 3(a), 15 U.S.C. § 78c(a) 1
Sec. 3(a)(1), 15 U.S.C. § 78c(a)(1) 2
Sec. 3(a)(10), 15 U.S.C. § 78c(a)(10) .. 9
Sec. 3(a)(12), 15 U.S.C. § 78c(a)(12) .. 5, 6
Sec. 3(a)(13), 15 U.S.C. § 78c(a)(13) .. 10
Sec. 3(a)(23), 15 U.S.C. § 78c(a)(23) .. 3
Sec. 5, 15 U.S.C. § 78e 1
Sec. 6, 15 U.S.C. § 78f 2
Sec. 6(b), 15 U.S.C. § 78f(b) 1
Sec. 6(b)(5), 15 U.S.C. § 78f(b)(5) 8
Sec. 7, 15 U.S.C. § 78g 7
Sec. 9, 15 U.S.C. § 78i 1
Sec. 17A(b)(1), 15 U.S.C. § 78q-1(b)(1) 1, 3
Sec. 19(b)(1), 15 U.S.C. § 78s(b)(1) ... 1, 3

PAGE

Sec. 25(a), 15 U.S.C. § 78y(a) 1
Sec. 25(a)(1), 15 U.S.C. § 78y(a)(1) ... 4

Security Investor Protection Act, as amended:
15 U.S.C. §§ 78aaa-78111 11

Legislative Materials

H.R. Rep. No. 626, 97th Cong., 2nd Sess. (1982) 13
S. Rep. No. 90, 97th Cong., 2nd Sess (1982) 14

Regulations

Federal Reserve Board Regulation T, 12 C.F.R. § 220.3(i) 7

Other

1 L. Loss, Securities Regulation 469 (2d Ed. 1961) 14

SEC Exchange Act Release No. 15575, 44 Fed. Reg. 11876 (1979) 7

SEC Exchange Act Release No. 16696, 45 Fed. Reg. 21420 (1980) 7

SEC Exchange Act Release No. 16801, 45 Fed. Reg. 32458 (1980) 3

SEC Exchange Act Release No. 17577, 46 Fed. Reg. 15242 (1981) 3

SEC Exchange Act Release No. 17598, 46 Fed. Reg. 16013 (1981) 4

46 Fed. Reg. 30844 (June 11, 1981) 9

SEC Exchange Act Release No. 18015, 46 Fed. Reg. 40849 (1981) 4

IN THE

Supreme Court of the United States

October Term, 1982

No. 82-327

CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED

and

THE OPTIONS CLEARING CORPORATION,

Petitioners,

v.

BOARD OF TRADE OF THE CITY OF CHICAGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE SECURITIES INDUSTRY ASSOCIATION AS *AMICUS CURIAE*

This brief is filed pursuant to Rules 36.1 and 42 of this Court in support of the petition for certiorari filed by the Chicago Board Options Exchange, Incorporated (the "CBOE") and the Options Clearing Corporation (the "OCC") in No. 82-327.[1] On August 25, 1982, Petitioners timely filed a Petition for Certiorari with this Court.

---

[1] Because the respondent did not consent to the filing of this brief, *amicus* filed a motion for leave to file the brief and the motion accompanies the proposed brief.

The text of Sections 2(a)(1) and 4(c) of the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 2, 6c, and Sections 3(a), 5, 6(b), 9, 17A(b)(1), 19(b)(1), and 25(a) of the Securities Exchange Act

(footnote continued on following page)

Interest of the Securities Industry Association as *Amicus Curiae*

The Securities Industry Association (the "SIA") is a trade association representing approximately 500 brokers and dealers responsible for over 90 percent of the nation's investment banking and securities brokerage business. The SIA is generally recognized as the primary public spokesman for the securities industry and the two questions before the Court are of vital importance to our members. Many of the SIA's members are regulated by both the Securities and Exchange Commission (the "SEC" or the "Commission") and the Commodities Futures Trading Commission (the "CFTC"); both our membership and the investing public are severely disadvantaged by the decision below which results in confusion over which investment products are regulated by which agency and which statutory scheme outlines the duties and responsibilities of our members as well as the rights and remedies of customers utilizing our members' services.

Statement

Petitioner CBOE has, since 1973, been a registered national securities exchange by an order of the SEC in accordance with Section 6 of the Exchange Act.[2] The CBOE maintains an exchange market for the trading of listed options.

The options traded by the CBOE are issued by petitioner OCC and are offered by prospectus. Until the Seventh

---

(footnote continued from preceding page)

of 1934 ("Exchange Act"), 15 U.S.C. §§ 78c(a), 78e, 78f(b), 78i, 78q-1(b)(1), 78s(b)(1) and 78y(a) and other statutory provisions are set forth in the appendix to the Petition For a Writ of Certiorari of the CBOE and the OCC.

[2] Unless exempted, Section 6 requires exchanges, as defined in Exchange Act Section 3(a)(1), 15 U.S.C. § 78c(a)(1) (1976), to be registered with the SEC as a "national securities exchange."

Circuit's opinion questioned their legal status, such options were regarded as securities which were registered, offered, and sold pursuant to Section 5 of the Securities Act of 1933 ("Securities Act").[3] The OCC is responsible for clearing such options transactions and is registered as a securities clearing agency in accordance with Exchange Act Section 17A(b)(1).[4]

Petitioner CBOE had, in accordance with Exchange Act Section 19(b)(1),[5] filed in April 1980 proposed amendments to its option rules to provide for trading of options on mortgage backed securities of the Government National Mortgage Association ("GNMAs").[6] GNMA securities are issued by private institutions and are secured by pools of mortgages and are guaranteed by the Government National Mortgage Association.

The SEC published the CBOE's proposed rules for comment and received over eighty comment letters. Commentators, with the exception of the Board of Trade of the City of Chicago (the "CBT"), generally supported the CBOE's proposals.

In February 1981, the SEC entered an order approving the CBOE's proposed rules.[7] Also in February 1981, the

---

[3] Because options are securities, the issuer (the OCC) must comply with the registration requirements of the Securities Act, 15 U.S.C. § 77e (1976).

[4] Unless exempted, clearing agencies, as defined in Exchange Act Section 3(a)(23), 15 U.S.C. § 78c(a)(23)(1976), are required to be registered with the SEC.

[5] Exchange Act Section 19(b)(1), 15 U.S.C. § 78s(b)(1)(1976), provides that exchanges must file proposed rule changes with the SEC and that interested persons shall be given an opportunity to comment on proposed rule changes.

[6] Notice of the proposed rule change was given by SEC Exchange Act Release No. 16801, 45 Fed. Reg. 32458 (1980).

[7] SEC Exchange Act Release No. 17577, 46 Fed. Reg. 15242 (1981).

OCC filed proposed rules concerning the issuance and clearance of GNMA options.[8] Again, only the CBT filed comments opposing the OCC's proposed rules.

In August 1981, the SEC entered an order approving the OCC's proposed rules changes.[9] The OCC then filed a supplement to its prospectus in accordance with Section 8 of the Securities Act. The supplement described options trading in GNMAs and was declared effective on October 30, 1981.

Claiming it was a person aggrieved by a final order of the Commission, the CBT filed petitions to review the Commission's order with the Seventh Circuit Court of Appeals.[10]

Decision of the Court Below

On March 24, 1982, a split panel of the Seventh Circuit Court of Appeals set aside the Commission's order approving the CBOE's proposal to trade GNMA options.[11] After an extensive analysis of the legislative history of the Commodity Exchange Act (the "CEA"),[12] the court held that the CFTC had exclusive jurisdiction over options on commodities, and stated that because of the prior trading of a

---

[8] Notice of the proposed rule change was given in SEC Exchange Act Release No. 17598, 46 Fed. Reg. 16013 (1981).

[9] SEC Exchange Act Release No. 18015, 46 Fed. Reg. 40849 (1981).

[10] Exchange Act Section 25(a)(1), 15 U.S.C. § 78y(a)(1) (1976), provides, in part, that persons aggrieved by an SEC order may obtain review in the appropriate Court of Appeals.

[11] *Board of Trade of the City of Chicago* v. *Securities and Exchange Commission, et al.*, 677 F.2d 1137 (7th Cir. 1982) (hereinafter, *CBT* v. *SEC*).

[12] 7 U.S.C. §§ 1-24 (1980).

GNMA futures contract, the CFTC had exclusive jurisdiction over the trading of GNMA options.[13]

The majority's opinion focused on the language of the 1974 and 1978 amendments to the CEA. Specifically, the issue was whether Section 2(a)(1)[14] of the CEA gave the CFTC exclusive jurisdiction over options on commodities. The same legislation specifically stated that it should not be deemed to, "supercede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission . . . or restrict the Securities and Exchange Commission . . . from carrying out its duties."

In addition to the issues raised by the petitioners, a key issue was whether GNMAs—an exempt security because it is a U.S. guaranteed obligation—became a "commodity" when futures trading on GNMAs began in 1975 or whether GNMAs are commodities only when traded in a futures market.[15] Stated differently, does a "security" as defined in both the Securities Act and the Exchange Act become a commodity for *all* purposes—such as when options on it are traded—when futures trading begins. An affirmative answer has a profound effect on market participants, both broker-dealers and investors.

The majority opinion also held that options are not securities within the definition given in the Exchange Act.[16] This holding also has a tremendous effect on all market participants.

---

[13] 677 F.2d at 1146.

[14] 7 U.S.C. § 2 (1980).

[15] Exchange Act Section 3(a)(12), 15 U.S.C. § 78c(a)(12) (1976), includes within the definition of exempt securities obligations which are guaranteed as to principal or interest by the United States or by a corporation in which the United States has a direct or indirect interest.

[16] 677 F.2d at 1156.

The dissent vigorously rejected the majority's reasoning. It stated that the conclusion that the SEC did not have jurisdiction was "extreme," and that Section 2(a)(1) of the CEA was designed "to grant exclusive jurisdiction over the trading of commodity *futures*, including options on such *futures* to the Commodity *Futures* Trading Commission" (emphasis in original).[17] Concerning the impact of the decision, the dissent stated, "the [majority's] strained analysis will gain no more attractive practical result in the real world than it has achieved conceptual triumph in the world of theory." [18]

Summary of Argument

The decision below misconstrues the definitional section of the CEA and will cause confusion in the regulatory scheme over options. Options on securities (such as GNMAs) have, historically, been offered and sold in accordance with the federal securities laws and subject to the rules and regulations of the SEC. A correct interpretation of the relevant statutes and rules will continue such regulation.

When amending the CEA in 1974 and 1978, Congress did not seek to limit the jurisdiction of the SEC over options on exempt securities. GNMAs, exempt securities under Exchange Act Section 3(a)(12), become commodities when they are traded for future delivery and only for that purpose. An option on a GNMA, therefore, is an option on a security subject to the SEC's jurisdiction and the transaction is covered by the federal securities laws. A security becomes a commodity (and therefore subejct to the CFTC's jurisdiction) solely for the purpose of completing the contract for future delivery.

---

[17] *Id.* at 1168, 69 (Cudahy, J., dissenting).

[18] *Id.* at 1184.

ARGUMENT

I.

The Decision Below Will Cause Confusion in the Regulatory Scheme Over Financial Instruments.

In the last ten years, a multitude of financial products have been brought to market. The trading volume in both options and futures contracts has increased dramatically. Efficient operation of the financial marketplace depends, to a large extent, on a logical and coherent regulatory background. Broker-dealers, futures commission merchants, ("FCMs")[19] and investors are all affected by the court of appeals decision which leaves uncertain the regulatory framework of the marketplace.

The SIA's members are brokers and dealers, many of which have both securities and commodities operations. Because of the differences between securities and commodities laws and rules in areas such as margin,[20] registration[21] and suitability[22] requirements, the SIA's members have a

---

[19] CEA Section 2(a)(1) defines FCMs as "individuals, associations, partnerships, corporations, and trusts engaged in the soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market . . . ."

[20] *See* Exchange Act Section 7, 15 U.S.C. § 78g (1976) and Section 3(i) of the Federal Reserve Board's Regulation T, 12 C.F.R. § 220.3(i). The CFTC has no authority under the CEA to establish margin levels for commodity futures contracts.

[21] *See* note 3, *supra*.

[22] *See, e.g.*, SEC Exchange Act Release No. 15575, 44 Fed. Reg. 11876 (1979) which required securities options exchanges to adopt new sales practice rules prior to the listing of new option products. In SEC Exchange Act Release No. 16696, 45 Fed. Reg. 21420 (1980), the SEC approved the new rules.

strong interest in obtaining the Court's interpretation on the construction of the two federal statutory and regulatory schemes involved.

Our members also have an interest in the wide availability of financial products to their clients. Both the majority and the dissent recognized the value of an efficient options market for GNMAs to investors and others. Indeed, the CBOE had to demonstrate to the SEC that their product was in the public interest[23] in its proposal to trade options on GNMAs. The SEC deliberated on the proposal for a long period of time and concluded that the product was in the public interest.

The court of appeals decision results in stoppage of trading in a product (exchange traded options on GNMAs) which virtually all the commentators (mortgage bankers, among others) felt was needed. The victims of this time-consuming litigation are participants in the GNMA market, and ultimately people seeking mortgages backed by the Government National Mortgage Association. A decision by this Court is needed to prevent a repeat of such fruitless litigation.

Apart from the decision's immediate impact on which agency has the statutory authority to approve rules dealing with the trading of options on GNMAs, the decision calls into question the SEC's regulation of all options. Since 1973, the OCC has registered options on securities in accordance with the registration provisions of the Securities Act. According to the majority, a security (GNMAs) be-

---

[23] Exchange Act Section 6(b)(5), 15 U.S.C. § 78f(b)(5) (1976), provides, among other things, an exchange shall not be registered as a national securities exchange unless the Commission determines that the rules of the exchange are "designed to . . . protect investors and the public interest . . . ."

comes a commodity when futures trading in it is initiated on a board of trade. Following the logic of the opinion of the Seventh Circuit, AT&T bonds would probably no longer be securities when and if futures trading on them begins.[24]

The majority also held that GNMA options are not securities. While admitting that GNMAs are securities, the court stated, "[e]xchange-formed off-set options . . . are not within the definition [of a security]" (footnote omitted).[25]

The impact of such a result is staggering. For example, in 1980 over 80 million options with a value in excess of $41 billion were traded on the CBOE and other exchanges. The majority's novel approach calls into question the appropriate regulatory scheme for all such trading and can only cause economic mischief to the major securities exchanges of this country and to the industry which the SIA represents.

Exchange Act Section 3(a)(10) defines the term security to include, "any . . . investment contract . . . for a security."[26] An option is a form of investment contract whether viewed technically or otherwise. Indeed, several courts have held that the definition of a security encompasses

---

[24] The New York Futures Exchange has applied for permission to trade futures in AT&T bonds. *See* 46 Fed. Reg. 30844 (June 11, 1981). The majority's decision attempted to distinguish, to some extent, between traditional securities (stocks, corporate bonds) and "illegitimate" investment vehicles such as GNMAs. Such semantics does not provide a meaningful distinction. *See, CBT* v. *SEC* at 1171, n.10 (Cudahy, J., dissenting).

[25] 677 F.2d at 1156. This holding of the Seventh Circuit has far-reaching effects. For example, do the federal securities laws provide a right or remedy to an investor who purchased options based upon a company's financial statements? It is also inconsistent with several other court decisions. *See,* note 27, *infra.*

[26] 15 U.S.C. § 78c(a)(10) (1976).

exchange-traded options.[27] As this court stated in *SEC* v. *C.M. Joiner,*[28] in evaluating whether an instrument is an investment contract, "[t]he test . . . is what character the instrument is given in commerce by the terms of the offer, the plan of distribution and the economic inducements held out to be the prospect."[29] Clearly, options are given the character of securities in commerce, are traded on registered exchanges, and are offered to a large number of investors.

In addition to the decision's impact on the brokerage industry, the decision creates confusion and problems for investors. For example, which statutory scheme provides rights and remedies to a party injured by illicit trading practices involving options on securities? Prior to the court of appeals decision, the answer was clear—the federal securities laws.[30] The purchase or sale of an option on a security —exempt or otherwise—involved a transaction "covered" by the federal securities laws. The court of appeals decision results in the purchaser or seller of an option (clearly a security) on a GNMA (an exempt security) having no remedy under the federal securities laws.

---

[27] In *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975) this Court, after reviewing the language of Exchange Act Section 3(a)(13), (definition of buy or sell) stated, "the holders of puts, calls, options, and other contractual rights or duties to purchase or sell securities have been recognized as 'purchasers' or 'sellers' of securities" 421 U.S. at 751. In *Mansbach* v. *Prescott, Ball & Turben,* 598 F.2d 1017 (6th Cir. 1979), the court stated that the Exchange Act's definition of a security, "clearly includes options to purchase or sell stock." *Id.* at 1026, n.40. *See also, Savino* v. *E.F. Hutton & Co.,* 507 F. Supp. 1225 (S.D.N.Y. 1981).

[28] *SEC* v. *C.M. Joiner Leasing Corp.,* 320 U.S. 344 (1943).

[29] 320 U.S. at 352-53. *Accord, Marine Bank* v. *Weaver,* 102 S. Ct. 1220, 1223 (1982); *SEC* v. *United Benefit Life Insurance Co.,* 387 U.S. 202, 211 (1967).

[30] *See Mansbach* v. *Prescott, Ball and Turben,* 598 F.2d 1017 (6th Cir. 1979) and text at note 27, *supra.*

Investors are affected in other ways. State securities laws provide rights and remedies for purchasers and sellers of securities. The Securities Investor Protection Act provides insurance for investors in securities.[31] Clearly, the transformation of an option on a GNMA into a commodity as well as holding an option not to be a security has a significant impact on the investing public at large.

All these factors lead to the conclusion that options on GNMAs are securities and should be regulated by the SEC. Such a decision is necessary to clarify the proper statutory and regulatory scheme over these, as well as numerous other, investment vehicles.

II.

The Decision Below Incorrectly Interprets Two Federal Statutes and Their Relationship to Each Other.

Securities and commodities markets are dynamic institutions, and lines between the two are often blurred. Congress, however, did attempt to apportion regulatory responsibility between the SEC and the CFTC, and the Seventh Circuit incorrectly interpreted the statutory apportionment.

Section 2(a)(1) of the CEA is the key provision. It provides that a commodity includes such traditional items as wheat, corn, oats and a host of other agricultural products. A commodity is also defined to include "all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." [32] This section gives the CFTC exclusive jurisdiction, "with respect to accounts,

---

[31] 15 U.S.C. §§ 78aaa-78lll (1976).

[32] 7 U.S.C. § 2 (1980).

agreements (including . . . [transactions] commonly known to the trade as an 'option' . . .) and transactions involving contracts of sale of a commodity for future delivery . . . ." The statute further provides that it neither supercedes nor restricts the SEC's jurisdiction or authority and it does not govern transactions in "security rights . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade."

The court of appeals found that the language "options . . . involving contracts of sale for future delivery" should be construed broadly; this coupled with its view that somehow a security becomes a commodity for *all* purposes when traded for future delivery on a board of trade led to its conclusion that the SEC had no authority to approve the trading of exchange traded options on GNMAs.

The court of appeals misinterpreted the statute and Congress' intent. When defining the term commodity, Congress distinguished between agricultural products and "services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." [33] The latter only become commodities when they are traded for future delivery and only for that purpose. A security (a GNMA, for example), therefore, becomes a commodity *solely* for the purpose of completing the contract for future delivery. For all other purposes—that is, when not traded for future delivery—they are securities whose purchases and sales are regulated by the federal securities laws and the rules and regulations promulgated thereunder.[34]

Secondly, the court of appeals interpreted the phrase "transactions involving contracts of sale of a commodity for

---

[33] *Id.*

[34] *See* cases cited at note 27, *supra.*

future delivery" too broadly. The court held that GNMA options "involve" the futures trading of the underlying commodity. As the dissent noted, options on GNMAs are not options on futures contracts, which are a "commodity" and therefore within the jurisdiction of the CFTC. The dissent stated:

> As the legislative history of the CEA makes clear, Congress enacted the exclusive jurisdiction proviso of § 2(a)(1) [of the CEA] so that trading in commodity futures, and related activities with a direct nexus to futures trading, such as . . . *options on futures* contracts, would be subject to regulation by the CFTC only. But the same rationale *does not apply to options on actuals, which unlike options on futures, do not have any necessary connection with futures trading* (citation omitted) (emphasis added).[35]

The court of appeals pointed out that the agreement between the SEC and CFTC—which calls for SEC regulation of options on GNMAs—does not resolve the issues because, "the two agencies cannot . . . enlarge or relinquish their statutory jurisdiction" [36] (citations omitted). It is noteworthy, however, that the House Committee on Energy and Commerce, in its report recommending legislation to implement the SEC-CFTC jurisdictional accord, noted that the Seventh Circuit's opinion, "is not consistent with long-standing Congressional intent that the SEC has the sole authority to regulate options on all securities, including exempt securities." [37] Similarly, the Senate Committee on Banking, Housing, and Urban Affairs' Report

---

[35] 677 F.2d at 1169 (Cudahy, J., dissenting).

[36] *Id.* at 1142, n.8.

[37] H.R. Rep. No. 626, 97th Cong., 2nd Sess. Part 1 at 3 (1982).

stated that the SEC's authority extends to put and call options on securities and that options, for purposes of the federal securities laws, "are considered to be within the definitions of 'security'." [38]

Conclusion

The Court should decide these important issues of federal law and resolve the confusion emanating from a misinterpretation of two federal statutes by the court of appeals. *Amicus* respectfully requests that the petition for the writ of certiorari be granted.

Respectfully submitted,

WILLIAM J. FITZPATRICK
Counsel of Record, General Counsel
Securities Industry Association

RONALD T. CARMAN
Assistant General Counsel
Securities Industry Association
120 Broadway
New York, New York 10271
(212) 425-2700

September 30, 1982

[38] S. Rep. No. 390, 97th Cong., 2nd Sess. 3, 5 (1982). *See also*, 1 L. Loss, Securities Regulation 469 (2nd ed. 1961).